IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

MISC. CIVIL APPLICATION NO.81 OF 2007

Mrs. Charuben K. Mehta .... Petitioner

versus

Lilavati Kirtilal Mehta Medical Trust and others ..... Respondent.

Mr. H.J.Thakhar Sr. Counsel i.b M/s. T.N.Tripathi & Co. for the applicant.
Mr. S.G.Aney Sr. counsel i/b Nankani & Asso. for Respondent no.1.
Mr. G.S.Godbole for Respondent nos. 6 and 7.
Mr. Sanjay Jain i/b M.G. Gawade for Respondent no.10
Mr. V.A.Thorat Sr. counsel with Mr. Vaibhav Sugdare i/b Mrs. Neelam Asrani for Respondent nos. 11 to 13.

CORAM; A.P. DESHPANDE, J.
DATED; 01ST AUGUST, 2007

P.C.;

1. The petitioner is the original Plaintiff in a suit pending on the file of Shri. R.B. Malik, Judge, City Civil Court, Bombay. The present application is moved under section 24 of Civil Procedure Code read with Clause 13 of the Letters' Patent of the Bombay High Court, making a prayer to withdraw the said suit No. 1997/06 from the Bombay City Civil Court, Bombay to the High Court for its trial and disposal on the Original Side of the High Court or in the alternative

for transfer of the said suit from the Court of Shri R.B.Malik to any other Judge of the City Civil Court, Bombay.

2. The Supreme Court has ordered expeditious disposal of the suit by the end of September 2007. Perusal of the record reveals that the Presiding officer is proceeding with the suit bearing in mind the direction issued by the Supreme Court in regard to the disposal of the suit expeditiously. The suit is being very hotly contested and at every stage various applications are filed and the orders passed in those applications are challenged by filing writ petitions and the matter is then carried to the Supreme Court by Special Leave Petition. In this background, the present application needs to be considered. Before I proceed to consider the application, it needs to be stated that the dispute in the suit pertains to control of administration of a big reputed hospital situated at Bombay by name ‘Lilavati hospital’.

3. The learned counsel for the petitioner/plaintiff has submitted that the plaintiff has reasonable apprehension that the Presiding Officer R.B. Malik has a bias against the plaintiff. It is then stated that the concerned Judge is trying to help the contesting defendants. The learned counsel has placed

reliance on some of the orders passed by the Presiding Officer to bring home the point that there exists a genuine likelihood of bias against the petitioner. Principally reliance is placed on following circumstances to establish the case of reasonable apprehension of bias.

a) The first circumstance is that when the plaintiff was not well and had tendered medical certificate, though the Judge granted an adjournment, he held out a threat that the doctor would be directed to file an affidavit and called for cross examination. The submission is that by the said act on the part of the Judge, reputed doctors are reluctant to extend medical treatment to the plaintiff.

b) Though belated filing of documents by the plaintiff was allowed, while passing order dated 14-6-2007 the question of legal consequences arising out of delayed filing of documents has been left open, thereby permitting the contesting defendants to re-agitate the issue at the time of final hearing of the matter.

c) The trial court has taken unaffirmed copy

of the affidavit of examination-in-chief of the plaintiff on record and exhibited the same. In the submission of the learned counsel for the petitioner, the intention on the part of the Presiding Officer in keeping unaffirmed copy of affidavit of examination-in-chief on record is to enable the contesting defendants to make use of the same at a later point of time.

d) Directing unsworn affidavits to be treated as affidavit of examination-in-chief instead of taking on record the sworn affidavit of the witnesses of the plaintiff shows the attitude against the plaintiff and in favour of the contesting defendants.

e) Lastly it is submitted that the witnesses of the plaintiff were put to inconvenience and detained for about four days for no just and valid reason, which again suggesting bias.

4. Before I proceed to consider the above referred circumstances/orders, it is necessary to briefly state the legal position in regard to doctrine of bias. In a judgment in case of **Parthasarathi Vs. State of Andhra Pradesh and S. Parthasarathi Vs. State of**

U.P. the Supreme Court has held that there must be "real likelihood of bias". The Supreme Court has held that the test of real likelihood and the test of reasonable suspicion are in consistent with each other. It then proceed to hold that the test is "whether reasonable man would, in the circumstances, infer that there is likelihood of bias". **Mathew,J.** observed in para 16 of the judgment as under:

> *"The tests of real likelihood and reasonable suspicion are inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances, infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right-minded persons would think that there is real likelihood of bias on the part of an inquiring office,r he must not conduct the inquiry, nevertheless, there must be a real likelihood of bias. Surmise or conjuncture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the*

> *inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision (see per Lord Denning, M.R. in Metropolitan Properties Co. (F.G.C.) Ltd. V. Lannon WLR 707. We should not, however, be understood to deny that the court might with greater propriety apply "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings."*

5. Thus the settled legal position that emerges from all the judgments touching the point is that whether in a given set of facts "right-minded persons would think that there is a real likelihood of bias on the part of the Presiding Officer". If the answer is yes, then the Judge must not conduct the trial. There are various judgments which follow the judgment of the Supreme Court referred to hereinabove, including the judgment rendered by a Division Bench of this court reported in **(2003) 4 M.L.J. page 810.** Thus I am required to find out as to whether right minded people would think that there exist a real likelihood of bias. Bearing in mind, the legal position, I proceed

to consider the submissions canvassed by the learned counsel for the petitioner in support of his prayer for transfer of the matter.

6. **As to point (a): -** By an order dated 28-6-2007 the court issued summons for production of medical papers. The court did not direct personal attendance of the doctor. However, the office issued a wrong summons directing personal attendance of the doctor and as such the trial court by an order dated 29-6-2007 directed the Deputy Registrar, to submit written explanation as to how come the doctor was summoned to appear in the case. The plaintiff had sought an adjournment by producing the medical certificate and as the contesting defendants had disputed the correctness thereof and the fact of ailment, the court had only directed production of the medical papers. At no point of time, the court directed the doctor to be cross examined. On the contrary, such a request was made by the contesting defendants, and it was rejected by the court by its order dated 2-7-2007. The record reveals that on the ground of illness of the plaintiff the matter was adjourned.

7. **As to point (b):-** The plaintiff filed the

documents at a late stage. However, the court permitted the plaintiff to file the documents by an order dated 14-6-2007. Perusal of the order dated 14-6-2007 indicate that the court left the question, about the evidentiary value of the said document, open to be considered at the time of final hearing of the matter. I do not think that the Presiding Officer has exhibited any bias to induce apprehension in the mind of the plaintiff by the said order.

8. **As to point (c):**- By an order dated 11-6-2007 the Judge was called upon to decide as to whether the unaffirmed or affirmed copy of the affidavit would constitute the examination-in-chief. The judge has passed an order that the affirmed copy would constitute the examination -in-chief. However the unaffirmed copy which was placed on record of the court by the plaintiff herself is permitted to be kept in the record. I fail to understand as to how the Judge can be said to have acted wrongly.

9. **As to points (d) & (e) :-** The petitioner submits that by an order dated 5-7-3007 the trial Judge has directed the unsworn affidavits of the witnesses of the plaintiff to be treated as affidavits of evidence in examination-in-chief. The objection is that instead of taking on record the sworn affidavits, the

unsworn affidavits are taken on record. The order dated 5-7-2007 is challenged by filing a writ petition bearing No. 5308/07 and the same is pending adjudication in this court. In the present proceedings, I am not called upon to comment upon the legality or illegality of the order. When a court has jurisdiction to decide the matter, it has jurisdiction to decide the same rightly so also wrongly. A wrong decision by itself does not convey bias. On perusal of the record, it is revealed that on 25th June 2007 the learned counsel for the plaintiff made a statement before the Judge that there will be no addition or alteration in the sworn affidavit and the sworn affidavit will not depart from the contents of the unsworn affidavit. Affidavit which was sworn on 4-6-2007 is said to have been served on the defendants on 26-6-2007 when the trial was to commence on 27-6-2007. According to the defendants, the examination-in-chief on the sworn affidavit had material additions and alterations as compared to the unsworn affidavit served earlier. Hence the contesting defendants filed an application for not accepting the sworn affidavit, and instead urged the court to take on record the unsworn affidavit. I am re-iterating that I am not adjudicating as to whether the impugned action of the Judge is right or wrong, But I am examining the same only for a limited purpose

to find out as to whether the same indicate bias. Perusal of the order dated 5-7-2007 indicates that the Judge was very much disturbed and pained to find that despite the assurance given by the counsel for the plaintiff, that there will be no variance in the affidavit of examination-in-chief of the witnesses from the unsworn affidavit, copies of which were served well in advance, and despite the said assurance, the Judge found the sworn affidavit deviating from the unsworn copies, which were served on the contesting defendants and hence passed the order. I do not find that the Judge has exhibited any bias in the order dated 5-7-2007. In view of the developments referred to hereinabove, the witnesses were detained for about four days as the court was hearing the parties on the application and passing orders thereon. The reason for detention of the witnesses was on account of illness of the plaintiff and an application moved by the plaintiff seeking permission of the Judge to interpose two witnesses for being examined, keeping in abeyance the evidence of the plaintiff.

10. The learned counsel has also tried to demonstrate illegality in various other orders with a view to show bais. Two of the orders again form subject matter of writ petitions that are pending in this court. I find

it very difficult to reach a conclusion of element of bias from the judicial orders, which are subject matter of challenge before this Court. In the back drop of the above referred facts and circumstances, I am unable to persuade myself to come to the conclusion that in the above facts and circumstances right minded person would think that there is "real likelihood of bias" on the part of the Presiding Officer. The learned counsel for the respondent submits that transfer application should not be allowed as a matter of course as an order to that effect is bound to casts a doubt on the integrity, reputation and competence of the concerned Judge.

11. In my view the present application cannot be allowed, in the absence of reasonable apprehension of bias being established. The application thus is summarily dismissed.

xxxx